Prairie Home Cemetery, Employer-Petitioner and American Federation of State, County and Municipal Employees, Council 40, AFL-CIO. Case 30-RM-433

April 28, 1983

DECISION ON REVIEW AND ORDER

By Members Jenkins, Zimmerman, and Hunter

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held on October 8, 1982, before Hearing Officer Ken Rock. On November 19, 1982, the Regional Director for Region 30 issued a Decision and Direction of Election in which he found, inter alia, that the Employer-Petitioner was an employer within the meaning of Section 2(2) of the Act. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations and Statements of Procedure, Series 8, as amended, the Union filed a timely request for review of the Regional Director's decision. In its request for review, the Union contended that the Regional Director's decision constituted a departure from officially reported Board precedent and was in direct violation of Section 2(2) of the Act, in that Section 2(2) specifically excludes "any State or political subdivision thereof" from the definition of "employer."

By telegraphic order dated December 16, 1982, the Board granted the Union's request for review and ordered that the election be stayed pending decision on review. On December 22, 1982, the Employer-Petitioner filed a brief in support of the Regional Director's decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the entire record in this proceeding with respect to the issue under review, including the briefs of the parties, and makes the following findings:

The Employer-Petitioner, hereinafter referred to as Prairie or the Cemetery, is an unincorporated cemetery association engaged in the business of selling burial lots and related retail and wholesale items, and in providing cemetery services. Although predating the charter of the city of Waukesha, Prairie is located within the city and the city owns the land on which the cemetery is located. All improvements on the land, however, were paid for and are owned by Prairie.

Prairie is governed by a five-member Cemetery Board established by a city of Waukesha ordinance.

Under the terms of the ordinance, members of the board are appointed by the mayor of the city of Waukesha and confirmed by the city of Waukesha Common Council. The powers and duties of the Cemetery Board are specified in the ordinance and include making rules and regulations for the management and care of the cemetery, appointing a cemetery superintendent (also referred to as the cemetery administrator), and making an "annual report of its doings" to the Waukesha Common Council. The ordinance further provides that the Cemetery Board "shall not incur any liability nor create any debt which cannot be fully paid and discharged by the 'Cemetery Development Fund,' then on hand, without first having submitted full and specific approval and secured its authorization therefor. If approved by the [Common] Council, the [Common] Council may authorize the improvement and may appropriate to the Board a sum sufficient to meet the necessary expenditures therefor." Despite this authorization, it appears that Prairie never has received funding or tax support from the city of Waukesha, but rather operates as a self-supporting entity.

Day-to-day operations of the cemetery are controlled by the cemetery administrator, who is considered a city department head and who attends some of the city's "department head meetings." The administrator also prepares Prairie's annual budget, which thereafter is submitted to the Common Council and incorporated into the city's budget. Prospective cemetery employees fill out job application forms at the Waukesha City Hall, but are interviewed and hired by Prairie's administrator. The Cemetery Board establishes all policies regarding the wages, hours, and working conditions of Prairie's employees. Wages and fringe benefits provided to Prairie's employees differ from those provided to city employees, except that both groups of employees participate in the Wisconsin Retirement Fund. It is undisputed that participation in the Wisconsin Retirement Fund is limited to state, county, and municipal employees of the State of Wisconsin. There is no interchange between city and cemetery employees, and supervision of the two employee groups is wholly separate.

Based on the foregoing, the Union contends that Prairie shares the city of Waukesha's political subdivision exclusion from the definition of "employer" contained in Section 2(2) of the Act. We agree.

¹ Sec. 2(2) of the Act provides, in relevant part, that:

The term "employer" includes any person acting as an agent of an employer directly or indirectly, but shall not include . . . any State or political subdivision thereof

In Wordsworth Academy, 262 NLRB 438 (1982),2 we observed that the political subdivision exemption traditionally has been limited to "(1) entities that are created directly by the State, so as to constitute departments or administrative arms of the government, or (2) entities that are administered by individuals who are responsible to public officials or to the general electorate."3 We find that both of these standards are applicable to Prairie and that it is excluded from the statutory definition of employer by either standard. Thus, it is undisputed that all of Prairie's operations are governed by its Cemetery Board, which was directly established by municipal ordinance of the city of Waukesha, and operates on land owned by that city. The administrator, who is appointed by the Cemetery Board, is considered a city department head and attends city "department head meetings." Moreover, all members of the Cemetery Board are appointed by the mayor of the city of Waukesha and confirmed by that city's Common Council. Under the terms of the municipal ordinance which established the Cemetery Board,⁴ the board is required to make an "annual report of its doings" to the Common Council. These facts are sufficient to establish that the Cemetery Board members are "responsible" to public officials of the city, notwithstanding testimony that the board's obligation to make annual reports to the Common Council has been largely ignored.

In view of all the foregoing, we find and conclude that Prairie is not an employer within the meaning of Section 2(2) of the Act.⁵ Accordingly, we shall dismiss the petition herein.

ORDER

It is hereby ordered that the petition filed herein be, and it hereby is, dismissed.

^a Member Hunter dissented in *Wordsworth* on the ground that he would return to the "intimate connection" test abandoned by the Board in *National Transportation Service*, 240 NLRB 565 (1979). Under that test, the Board will refuse to assert jurisdiction over employers that are so intimately connected to exempt employers that "the policy considerations underlying the latters' exemption also apply to them." However, Member Hunter finds it unnecessary to reach that issue in this case, since the cemetery does not fall within Sec. 2(2)'s definition of employer.

² Accord: NLRB v. Natural Gas Utility, 402 U.S. 600 (1971); Jervis Public Library Assn., 262 NLRB 1386 (1982) (Member Zimmerman dissenting on the ground that the facts of that case did not fall within the standard set forth above).

⁴ While it is clear that cemetery operations on the site now occupied by Prairie predate the charter of the city of Waukesha, the record does not reflect the organizational structure which existed at the time interment operations commenced. In any event, it is clear that Prairie, as an entity, was established by and is operated pursuant to municipal ordinance.

While not determinative, our conclusion in this regard is buttressed by the fact that Prairie's employees are participants in the Wisconsin Retirement Fund.